No. 15-108

RECD
DEC 22 2015
OFFICE OF THE CLERK

In the Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO,
Petitioner,

–v–

LUIS M. SÁNCHEZ VALLE and
JAIME GÓMEZ VÁZQUEZ,
Respondents.

On Writ of Certiorari to the Supreme Court of Puerto Rico

BRIEF OF AMICUS CURIAE VIRGIN ISLANDS BAR ASSOCIATION (VIBA) IN SUPPORT OF RESPONDENTS

J. RUSSELL B. PATE
PRESIDENT
VIRGIN ISLANDS BAR ASSOCIATION
2155 KING CROSS STREET,
SUITE 2
CHRISTIANSTED, USVI 00820
(340) 778-7497

EDWARD L. BARRY
JOSEPH A. DIRUZZO, III
CO-CHAIRS
VIBA LITIGATION COMMITTEE

DANA M. HRELIC
COUNSEL OF RECORD
WESLEY W. HORTON
BRENDON P. LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 GILLETT STREET
HARTFORD, CT 06105
(860) 522-8338
DHRELIC@HORTONSHIELDSKNOX.COM

DECEMBER 22, 2015 — *COUNSEL FOR AMICUS CURIAE*

SUPREME COURT PRESS • (888) 958-5705 • BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Whether the Commonwealth of Puerto Rico and the Federal Government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. THIS COURT LACKS APPELLATE JURISDICTION TO HEAR THE PETITIONER'S INTERLOCUTORY APPEAL 7

II. THE COMMONWEALTH OF PUERTO RICO AND THE FEDERAL GOVERNMENT ARE NOT SEPARATE SOVEREIGNS 17

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Abdul-Akbar v. McKelvie,
239 F.3d 307 (3d Cir. 2001) 25

Abney v. United States,
431 U.S. 651 (1977) ..... passim

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 7

Arizona State Legislature v. Arizona Independent Redistricting Comm'n,
__U.S.__, 135 S.Ct. 2652 (2015) 20

Arizona v. Rumsey,
467 U.S. 203 (1984) 17

Ashe v. Swenson,
397 U.S. 436 (1970) 16

Ball v. United States,
163 U.S. 662 (1896) 17

Barnard v. Thorstenn,
489 U.S. 546 (1989) 2

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 20

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 11, 14, 17

Commonwealth v. Mills,
286 A.2d 638 (Pa. 1971) 27

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975) 14, 15, 17

TABLE OF AUTHORITIES—Continued

Page

DiBella v. United States,
369 U.S. 121 (1962) 10

Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero,
426 U.S. 572 (1976) 20, 22

Figueroa v. People of Puerto Rico,
232 F.2d 615 (1st Cir. 1956) 3

Flanagan v. United States,
465 U.S. 259 (1984) 10

Florida v. Thomas,
532 U.S. 774 (2001) 14

Fornaris v. Ridge Tool Co.,
400 U.S. 41 (1970) 15

Franklin California Tax-Free Trust v. Puerto Rico,
805 F.3d 322 (1st Cir. 2015) 26

Gov't of the V.I. v. Brathwaite,
782 F.2d 399 (3d Cir. 1986) 5

Guam v. Okada,
715 F.2d 1347 (9th Cir. 1982) 12

In re Holcombe,
S. Ct. Civ. No. 2015-0007, __V.I.__, 2015 WL 7576037 (V.I. Nov. 25, 2015) 2

Jefferson v. City of Tarrant,
522 U.S. 75 (1997) 16

Kansas v. Marsh,
548 U.S. 163 (2006) 17

TABLE OF AUTHORITIES—Continued

Page

Lacap v. INS,
138 F.3d 518 (3d Cir. 1998) 25

Nolos v. Holder,
611 F.3d 279 (5th Cir. 2010) 25

Puerto Rico v. Sanchez Valle, et al.,
No. 15-108 (U.S. Oct. 19, 2015 &
Oct. 20, 2015) 1

Rabang v. Boyd,
353 U.S. 427 (1957) 25

Rabang v. INS,
35 F.3d 1449 (9th Cir. 1994) 25

Reichelderfer v. Quinn,
287 U.S. 315, 318 (1932) 25

Rivera-Moreno v. Gov't of the V.I.,
61 V.I. 279 (V.I. 2014) 5, 14

Tuaua v. United States,
788 F.3d 300 (D.C. Cir. 2015) 4, 25

United States v. Burroughs,
289 U.S. 159 (1933) 12

United States v. Gillette,
738 F.3d 63 (3d Cir. 2013) 27

United States v. Ginyard,
511 F.3d 203 (D.C. Cir. 2008) 13

United States v. Hyde,
37 F.3d 116 (3d Cir. 1994) 5

United States v. MacDonald,
435 U.S. 850 (1978) 10

TABLE OF AUTHORITIES—Continued

Page

United States v. Marino,
200 F.3d 6 (1st Cir. 1999) 13

United States v. Scott,
437 U.S. 82 (1978) 17

United States v. Thoms,
684 F.3d 893 (9th Cir. 2012) 14

United States v. Tom,
787 F.2d 65 (2d Cir. 1986) 13

United States v. Witten,
965 F.2d 774 (9th Cir. 1992) 13

Valmonte v. INS,
136 F.3d 914 (2d Cir. 1998) 25

Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc.,
795 F.2d 325 (3d Cir. 1986) 19

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V 8

U.S. CONST. AMEND. X 26

U.S. CONST. AMEND. XV 24

U.S. CONST. ART. II, § 1 24

FEDERAL STATUTES

8 U.S.C. § 1401 24

8 U.S.C. § 1402 25

8 U.S.C. § 1406 25

TABLE OF AUTHORITIES—Continued

Page

8 U.S.C. § 1407 25
15 U.S.C. § 80a-36 19
18 U.S.C. § 2117 19
18 U.S.C. § 3731 12
18 U.S.C. § 660 19
18 U.S.C. § 922 8
28 U.S.C. § 1257 ..... 14, 15, 17
28 U.S.C. § 1258 ..... 7, 10, 15
48 U.S.C. § 1561 26
48 U.S.C. § 1704 ..... 18, 19
48 U.S.C. §§ 1701-1708 19
49 U.S.C. § 80501(b) 19
Pub. L. 90-496, 73 Stat. 569 (1968) 22
Pub. L. 90-496, 82 Stat. 837 (1968) 22
Pub. L. 92-270, 86 Stat. 118 (1972) 22
Pub. L. 98-454, 98 Stat. 1732 (1984) 22
Pub. L. 110-229, 122 Stat. 754 (2008) 23

PUERTO RICO STATUTES

P.R. Laws Ann. tit. 25, § 458 ..... 8, 9, 15, 16
P.R. Laws Ann. tit. 25, § 458c 8, 15, 16
P.R. Laws Ann. tit. 25, § 458f 8, 15, 16
P.R. Laws Ann. tit. 25, § 458i 8, 15, 16

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE HISTORY

U.S. House of Representatives, Committee on Insular Affairs, Hearings on H.R. 11751, 74th Cong., 2d sess. (1936) 21

JUDICIAL RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

William W. Boyer, *America's Virgin Islands: A History of Human Rights and Wrongs* (2d ed. 2010) 21

N.Y. TIMES, Aug. 18, 1916 20

STATEMENT OF INTEREST[1]

The Virgin Islands Bar Association ("VIBA") as *amicus curiae* respectfully submits this brief in support of the Respondents. The VIBA is an integrated bar association with approximately 1000 members practicing within the territory of the United States Virgin Islands.[2] The Virgin Islands is located in the Lesser Antilles of the Caribbean and consists primarily of the islands of St. Croix, St. John, St. Thomas, and Water Island, along with numerous lesser cays.

The VIBA, along with the Supreme Court of the Virgin Islands, governs the practice of law there and brings together attorneys of all levels of experience in all fields of practice. The mission of the VIBA is to promote advancements and improvements in the administration of justice and access to justice, to improve and remain connected to its community

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed with this Court blanket consents to the filing of *amicus curiae* briefs in support of either party or neither party. *See* Docket in *Commonwealth of Puerto Rico v. Sanchez Valle, et al.*, No. 15-108 (U.S. Oct. 19, 2015 & Oct. 20, 2015).

[2] Neither this brief nor the decision to file it should be construed to reflect the view of any individual member of the VIBA. Moreover, some of the members of the VIBA are judges. No judicial members participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any judicial member before filing.

through public education and public service outreach, and to monitor and advocate for any public policy issues affecting the judicial system, its servants, and their clients. These goals are accurately reflected in its motto: "Striving for Justice Serving our Community."

This case touches upon several areas relevant to these vital goals. The practice of law in the Virgin Islands, as well as the structure of the judicial system itself, has developed and advanced in large part based on and because of its status as a Territory, and not a State. Active VIBA members regularly represent indigent criminal defendants in the Virgin Islands on both a compulsory and voluntary basis, and are therefore intimately familiar with the current interplay between local and federal criminal laws in the Territory. *See Barnard v. Thorstenn*, 489 U.S. 546, 557 (1989); *In re Holcombe*, S. Ct. Civ. No. 2015-0007, __V.I.__, 2015 WL 7576037 (V.I. Nov. 25, 2015). In this capacity, VIBA members must routinely consider whether, and to what extent, portions of the United States Constitution apply to the Virgin Islands.

Based upon these strong interests in the stability and vitality of the practice and enforcement of law in the Virgin Islands, the VIBA urges this Court to either dismiss this matter for lack of appellate jurisdiction, or affirm the judgment of the Supreme Court of Puerto Rico and hold that the Commonwealth of Puerto Rico and the federal government are not separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

SUMMARY OF ARGUMENT

The first matter before this Court is that of appellate jurisdiction; that is, whether this Court has appellate jurisdiction to hear the Petitioner's interlocutory appeal from the dismissal of a single count of a multi-count indictment[3] based on double jeopardy where the other counts, unaffected by the dismissal, are currently pending. It does not.

The second matter before this Court concerns the question presented on the merits. It raises issues that could have a tremendous effect not only on the legal relationship between the United States and the Territory of the Virgin Islands but also on the rights and privileges of Virgin Islanders in their everyday lives. The critical, if not dispositive, point to consider is that the laws and courts of the Virgin Islands owe their existence to the same authority as do those of the federal government: the United States. The same holds true for the Commonwealth of Puerto Rico. It may have adopted its own constitution in 1952, but not without (1) the grant of authority to do so by Congress, (2) the imposition of certain requirements in that constitution by Congress, and (3) the approval of said constitution by Congress. *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956). Puerto

---

[3] The record reflects that the Petitioner filed three single-count Complaints, or indictments, against each Respondent, but that each set of three was effectively consolidated and treated as one, as each was part and parcel of the same proceeding against each respective Respondent. JA7-10.

Rico has never received the equal status that is provided to the true dual sovereigns in our federalist system of government: the fifty states, and the various Native American tribes. That Puerto Rico has adopted an illusory constitution that Congress may amend or overrule at any time does not make it a separate sovereign for the purposes of the Double Jeopardy Clause of the United States Constitution; the fact that Congress may transfer or cede Puerto Rico, as has been done with other territories in the past—including the Commonwealth of the Philippines—itself demonstrates that it cannot be a sovereign.

Should this Court recognize Puerto Rico as a separate sovereign, it will be imposing on its people a burden of Statehood without the accompanying rights and privileges to which actual citizens of States are entitled. Those who reside in Puerto Rico, the Virgin Islands, and other territories face many extraordinary challenges. Territories have no voting voice in the federal government that oversees so many aspects of their lives. They receive no electoral votes for President. No territory has representation in the United States Senate, and each receives only one non-voting delegate in the House of Representatives.

Several courts have held that those born in the territories are citizens only by operation of statute, and not the United States Constitution, *see, e.g.*, *Tuaua v. United States*, 788 F.3d 300, 307-08 & n.7 (D.C. Cir. 2015), while another has held that individuals leaving the territories for one of the fifty states may undergo a full search of their person and belongings even "in the absence of any degree of suspicion that the individual is engaged in wrongdoing." *United States*

v. Hyde, 37 F.3d 116, 118 (3d Cir. 1994). But because of the single-sovereign doctrine, the right to be free from double jeopardy is one of the very rare instances where residents of America's territories receive greater protection than those afforded to residents of the fifty states: an individual acquitted of a crime in federal court is protected from further harassment by the territorial government (and vice versa) with respect to the same act.

Notwithstanding the Petitioner's representations to the contrary, the decision in this case will necessarily extend to the Territory of the Virgin Islands, where its people are subject to the same federal legislative oversight as their counterparts in Puerto Rico, and where the same principle of single-sovereignty has been accepted by both the Supreme Court of the Virgin Islands and the United States Court of Appeals for the Third Circuit. *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 305 (V.I. 2014); *Gov't of the V.I. v. Brathwaite*, 782 F.2d 399, 406 (3d Cir. 1986). The existence of a constitution in Puerto Rico does not change the fact that it was only created with the legislative permission and approval of Congress; although the Virgin Islands has not adopted its own constitution in the Virgin Islands, it has undergone a similar process through which the fundamental provisions of its governing Organic Act were proposed by the people or their elected representatives and ultimately approved by Congress.

The reach of this Court's decision, should it address the question presented on the merits, extends beyond the borders of Puerto Rico and further than the four corners of the Puerto Rico Constitution. It includes, at

the very least, the Virgin Islands, by virtue of its identical territorial status. If this Court should recognize Puerto Rico as a separate sovereign for double jeopardy purposes—in the process providing the citizens of Puerto Rico with fewer rights than they are presently entitled—but continue to deny the direct applicability of other constitutional provisions, it will set dangerous precedent illustrative of the kind of inconsistent application that could render parts of the Constitution meaningless. After all, what good is a constitutional right that is not constitutionally applied? The VIBA suggests that if this Court feels inclined to recognize Puerto Rico as a dual sovereign for the purposes of the Double Jeopardy Clause, then it should also consider whether the provision of representation and voting rights equivalent to those received by citizens of States is the better option for Puerto Rico, and therefore the Virgin Islands, and its citizens.

The VIBA, on behalf of its members, their clients and their prospective clients, urges this Court to affirm the judgment of the Puerto Rico Supreme Court in dismissing the relevant charges against the Respondents as barred by the Double Jeopardy Clause of the United States Constitution.

ARGUMENT

I. THIS COURT LACKS APPELLATE JURISDICTION TO HEAR THE PETITIONER'S INTERLOCUTORY APPEAL

The Petitioner claims that this Court has jurisdiction over this appeal under 28 U.S.C. § 1258, which provides that

> Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or whether the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id. (emphasis added). Because the decision rendered by the Puerto Rico Supreme Court is not a final judgment, this Court should dismiss this case for lack of subject matter jurisdiction.[4]

---

[4] "The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-07 (2006).

The relevant facts are fairly straightforward. The Respondents were charged at the territorial level with violating several sections of the Puerto Rico Weapons Act, including P.R. Laws Ann. tit. 25, § 458, which bars the sale of weapons and ammunition without a license, as well as P.R. Laws Ann. tit. 25, §§ 458c, 458f, 458i. (Pet.App.10a). In federal court, however, the Respondents were only prosecuted for illegally selling weapons and ammunition without a license, in violation of 18 U.S.C. § 922(a)(1)(A)–an offense that subsumes the lesser included offense of that in § 458 of the Puerto Rico Weapons Act. (Pet.App.10a). The Respondents were not prosecuted at the federal level for offenses similar to or including any of the other separate and different charges pending in territorial court. (Pet.App.10a).

After both Respondents were separately convicted and sentenced to the charges in federal court, they each filed a motion to dismiss the entire case against them, claiming that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protected them from being prosecuted in Puerto Rico. The trial court, over the government's objection in each case, granted the motions to dismiss, ruling that the sovereignty of Puerto Rico to criminally prosecute its citizens resided and emanated from the federal government through Congress. (Pet.App.3a, 6a). It therefore concluded that the charges filed against the Respondents violated their constitutional protection against double jeopardy provided by the United States Constitution and the Puerto Rico Constitution, dismissing the entirety of both indictments. (Pet.App.3a, 6a). The government appealed and, after consolidating both cases, the Court of Appeals

reversed the trial court's rulings, holding that the Respondents could be submitted to criminal prosecution both in federal court and in territorial court in Puerto Rico for the same criminal behavior without violating the constitutional safeguard against double jeopardy. (Pet.App.6a).

The Puerto Rico Supreme Court then partially reversed the decision of the Puerto Rico Court of Appeals. In its decision, the Supreme Court ordered dismissal of only the count in each indictment related to § 458 of the Puerto Rico Weapons Act. (Pet.App.69a). Notably, the remaining counts in the indictments were untouched by the Supreme Court's decision and therefore, once reinstated by the Court of Appeals, they remain pending after the Supreme Court's decision. The government then petitioned for writ of certiorari, which this Court granted.

The record thus reflects that the constitutional question in this case is limited to a single count in each of the multi-count indictments against the Respondents. Because the Supreme Court's decision affected some but not all of the counts against the Respondents, it was not a final judgment. The question then arises as to whether the Petitioner's interlocutory appeal is permissible under some exception to the final-judgment rule or whether, to the contrary, this Court is without jurisdiction to hear it. Because the Court's judgment fits no exception to the final judgment rule, this Court has no appellate jurisdiction over this matter and should dismiss the Petitioner's appeal.

It is well established that there exists in criminal cases "a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States*, 431 U.S. 651, 656 (1977). Finality of judgment is generally required "as a predicate for federal appellate jurisdiction." *Id.* "Adherence to this rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Id.* at 657 (quoting *DiBella v. United States*, 369 U.S. 121, 126 (1962)); *see also United States v. MacDonald*, 435 U.S. 850, 853-54 (1978) ("[t]he rule of finality has particular force in criminal prosecutions because encouragement of delay is fatal to the vindication of the criminal law" [internal quotation marks omitted]). "The importance of the final judgment rule has led the Court to permit departures from the rule only when observance of it would practically defeat the right to any review at all." *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (internal quotation marks omitted). The right of appeal in criminal cases "is purely a creature of statute"; *Abney*, 431 U.S. at 656; and, consistent with that principle, a party must satisfy the terms of the applicable statute–in this case, 28 U.S.C. § 1258–in order to exercise that statutory right in the present case.

This Court previously has addressed pretrial orders regarding a motion to dismiss an indictment on the ground of double jeopardy, but only insofar as (1) the defendant moved to dismiss an entire one-count

indictment, (2) the pretrial orders denied that motion to dismiss, and (3) the defendant sought to appeal immediately rather than at the close of trial. In *Abney*, this Court held that otherwise interlocutory pretrial orders in such cases fall within the "collateral order" exception to the final-judgment rule articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and thus constitute an immediately appealable final judgment.[5] *Abney*, 431 U.S. at 659.

The *Abney* Court analyzed a pretrial denial of a motion to dismiss an indictment on double jeopardy grounds in accordance with these three factors and ultimately concluded that the denial of a motion to dismiss an indictment based on double jeopardy grounds is an immediately appealable final judgment. *Id.* It emphasized that the protection against double jeopardy, if denied at first, "would be significantly undermined if appellate review were postponed until after conviction and sentence." *Id.* at 660. The Court explained that the right that the Double Jeopardy Clause protects is the right not to be "twice put to trial for the same offense," and the protections of the Clause

> would be lost if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is

---

[5] The Court in *Cohen* recognized that an otherwise interlocutory order qualifies as an effectively "final" one when it (1) fully and finally decides (2) a separate question collateral to the merits of the underlying proceeding, and (3) the decision involves an important right and must be appealed immediately or else the right will be "lost, probably irreparably" if appellate review is deferred to the end of the case. 337 U.S. at 546-47.

> acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.

Id. at 661-62. "Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 662.

This Court has not subsequently addressed whether the rule in *Abney* extends to an appeal by the government from the granting of a motion to dismiss a single count of a multi-count indictment. As a practical matter, this may be because 18 U.S.C. § 3731 permits the United States to appeal from an order "dismissing an indictment or information as to any one or more counts." But by its own terms, this statute only applies to proceedings in federal district courts in which the United States is a party; it cannot authorize an appeal by a territorial government from a non-final decision of a territorial supreme court. *United States v. Burroughs*, 289 U.S. 159, 163-64 (1933) (held that predecessor to 18 U.S.C. § 3731 did not permit appeal from District of Columbia local court system to United States Supreme Court); *Guam v. Okada*, 715 F.2d 1347 (9th Cir. 1982) ("We find nothing in the language of section 3731 or its legislative history to indicate an intent to authorize an appeal in a criminal case by a territorial government.").

Several federal Courts of Appeal, however, have considered whether the reasoning from *Abney* should extend to an appeal taken by the defendant from the

denial of a motion to dismiss a single count of a multi-count indictment. *Compare United States v. Witten*, 965 F.2d 774, 776 (9th Cir. 1992) ("*Abney* does not provide a basis for finding jurisdiction here. The appellants moved to dismiss an alleged predicate act, not an entire indictment, or even an entire count. Even if the alleged predicate act were dismissed, the appellants would still face trial "); *United States v. Tom*, 787 F.2d 65, 68 (2d Cir. 1986) (held that *Abney* does not apply to permit an interlocutory appeal from District Court's order refusing to dismiss a portion of one count in a multi-count indictment because defendant would be tried on the remainder of the count anyway; dismissed for lack of appellate jurisdiction); *with, United States v. Ginyard*, 511 F.3d 203, 208 (D.C. Cir. 2008) (applied *Abney* and found appellate jurisdiction, holding that a defendant may not be put to trial twice on a single count of an indictment just as he may not be put to trial twice on an entire indictment under Double Jeopardy Clause); *see also United States v. Marino*, 200 F.3d 6, 11-12 (1st Cir. 1999) (found no appellate jurisdiction to review defendant's appeal from denial of motion *in limine* to exclude evidence as to a certain count because even if motion was granted a retrial on that count would still have been necessary and postponement of the appeal would not have "irretrievably deprive[d]" defendant of any double jeopardy protection).

As these cases illustrate, "in the context of a double jeopardy claim, an interlocutory appeal is available under the collateral order doctrine only where the asserted right would be 'lost, probably irreparably,' if review had to await final judgment.'" *Tom*, 787 F.2d at 68 (quoting *Abney*, 431 U.S. at 658)

(internal quotation marks omitted). Where a motion to dismiss a single count of a multi-count indictment is denied in its entirety, and but for the opportunity to appeal the denial immediately, the defendant will lose his double jeopardy protections, such an immediate appeal is permissible. Where, however, a motion to dismiss a portion of a count in a multi-count indictment is denied (or even granted) and the defendant would have to face trial on the challenged count anyway, the order is not immediately appealable and must be deferred to the end of the case. What follows is that a defendant is not entitled to take an interlocutory appeal from a pretrial order concerning a motion to dismiss a count on which trial will in any event occur; in other words, he cannot immediately appeal an order on a count when waiting until the end of the case to appeal it will not deprive him of any double jeopardy rights. The same holds true with even greater force with respect to an interlocutory appeal by the government, since the United States Constitution confers rights on criminal defendants, and not the prosecution. *United States v. Thoms*, 684 F.3d 893, 902-03 (9th Cir. 2012); *Rivera-Moreno v. Gov't of the V.I.*, 61 V.I. 279, 321 (V.I. 2014).

Finally, in addition to *Abney* and the collateral order doctrine from *Cohen*, this Court has applied the rule set forth in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), to limited circumstances in the criminal context involving appeals taken from state court judgments rendered before the conclusion of all proceedings in state court under 28 U.S.C. § 1257 *See, e.g., Florida v. Thomas*, 532 U.S. 774, 777-81 (2001) (dismissing writ of certiorari for want of jurisdiction after applying *Cox*). In *Cox*, the Court

construed § 1257, which authorizes the Court's review of final judgments rendered by the highest court of a state, to treat those judgments as final in cases where (1) there are further proceedings yet to occur but where the federal issue is conclusive or the outcome of further proceedings preordained; (2) the federal issue will survive and require decision regardless of the outcome of the future state-court proceedings; (3) the federal claim has been finally decided and later review of the federal issue cannot be had, whatever the outcome of the case; or (4) the state court has conclusively decided a federal issue but the party seeking review might prevail on the merits on nonfederal grounds. *Cox*, 420 U.S. at 479-83.

First, arguably, *Cox* does not apply, as a judgment rendered in the Puerto Rico Supreme Court is not a state court judgment under § 1257.[6] *See, e.g., Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). Moreover, even if *Cox* does apply, only the first three categories are relevant to the present matter, and the Petitioner's interlocutory appeal does not fall into any of them. Because the Puerto Rico Supreme Court left untouched the judgment of the Puerto Rico Court of Appeals reinstating the charges arising under Sections 458c, 458f and 458i of the Puerto Rico Weapons Act, its conclusion that the counts brought under Section 458 are barred by double jeopardy does not conclusively end the litigation or render the

---

[6] Section 1257(b) expressly includes the District of Columbia Court of Appeals as within the term "highest court of a State," but omits mention of the Puerto Rico Supreme Court. This makes sense, as jurisdiction over appeals from the Puerto Rico Supreme Court is governed by 28 U.S.C. § 1258.

outcome preordained.[7] *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997) ("Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in Petitioners' complaint."). Nor will the federal issue necessarily survive regardless of the outcome of the case; if the Respondents are ultimately acquitted on the remaining charges—Sections 458c (illegally carrying a firearm), 458f (illegally carrying a rifle), and 458i (transferring a mutilated weapon) charges—then collateral estoppel would likely prevent a prosecution under Section 458 (illegally selling and transferring a firearm), since the jury would have necessarily found that the Respondents never possessed a firearm. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). And this is not a case in which later review of the double jeopardy issue can never be had regardless of the outcome of the case; if the Respondents are ultimately convicted on the remaining charges, Puerto Rico could still appeal the dismissal of the Section 458 counts, since the dismissal was "on a basis unrelated to factual guilt or

---

[7] Moreover, as this Court implied in *Jefferson*, the Puerto Rico Supreme Court may, as part of future appellate proceedings in this case, choose to overturn or reexamine its double jeopardy decision. 522 U.S. at 83. In fact, the decision in this case itself overturned a prior precedent of that court. And as the respondents noted in their opposition to certiorari, the United States Court of Appeals for the First Circuit is currently considering similar issues in other cases, the disposition of which may cause the Puerto Rico Supreme Court to reconsider its own decision.

innocence."[8] *United States v. Scott*, 437 U.S. 82, 99 (1978).

In sum, the Petitioner's interlocutory appeal fails to fit into either the collateral order exception to the final judgment rule articulated in *Cohen* and applied in *Abney* or the factors listed in *Cox* for state court judgments under § 1257 It is premature and therefore should be dismissed for lack of jurisdiction.

II. THE COMMONWEALTH OF PUERTO RICO AND THE FEDERAL GOVERNMENT ARE NOT SEPARATE SOVEREIGNS

The Petitioner offers, as the essence of this case, the question of whether Puerto Rico law emanates from a different source of authority than federal law. (Pet.Br.1). The answer, the Petitioner resoundingly states, is yes:

> Puerto Rico law emanates from authority delegated by the people of Puerto Rico, who engaged in an exercise of popular sovereignty in 1952 by adopting their own Constitution establishing their own government to enact

---

[8] The fact that there is a situation in which Puerto Rico could appeal the decision after entry of final judgment distinguishes this case from *Kansas v. Marsh*, 548 U.S. 163 (2006), where the nature of the state supreme court's decision—holding the state death penalty statute unconstitutional while simultaneously requiring a new trial on the underlying offense—truly prevented the prosecution from obtaining review at a future date under any circumstances, given the prohibition on the prosecution appealing a jury's acquittal, *see Ball v. United States*, 163 U.S. 662, 671 (1896), or the prosecution seeking capital punishment after a lesser sentence has already been imposed, *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

> their own laws. The Commonwealth of Puerto Rico is a creature of the people of Puerto Rico, not of Congress. That point resolves this case.

(Pet.Br.1-2, emphasis in original). For support, the Petitioner points to the people of Puerto Rico's adoption of their own Constitution, which it proclaims "is a democratic manifestation of the will of the people of Puerto Rico." (Pet.Br.2). Since Congress's 1952 approval and ratification of the Puerto Rico Constitution (after conditioning that approval on certain minor changes), the Petitioner characterizes Puerto Rico's status as something between a state and a territory—a sovereign territory, so to say—whose laws emanate from the people of Puerto Rico and not the federal government. (Pet.Br.17-18).

In order to make this argument, the Petitioner exalts its own constitution over the organic acts of Congress that permit self-governance by the other territories, including the Virgin Islands (and the Virgin Islands Revised Organic Act of 1954). In so doing, the Petitioner elevates form over substance. The essential flaw in the Petitioner's argument is that the characteristics it derives from the Puerto Rico Constitution upon which it relies to demonstrate Puerto Rico's dual sovereignty apply equally to the United States Virgin Islands and the Virgin Islands Revised Organic Act of 1954, which the Petitioner classifies as a single-sovereign territory.[9] (Pet.Br.28)

---

[9] The Petitioner cites to 48 U.S.C. § 1704 for the proposition that a federal statute provides that the Virgin Islands, Guam, and American Samoa and the federal government are a single sovereign for federal double jeopardy purposes. (Pet.Br.39 n.4). This proposition is both incomplete and inaccurate. Section 1704

(proposition that Puerto Rico law emanates from different source than federal law "may not have been true prior to the adoption of the Puerto Rico Constitution in 1952, insofar as the Puerto Rico legislature at that time exercised authority delegated by Congress through organic acts"); (Pet.Br.38 n.4) (District of Columbia, Guam, the Virgin Islands, and American Samoa all self-governed pursuant to organic acts of Congress; lower courts have held that these territories and the federal government are a single sovereign for federal double jeopardy purposes).

> Specifically, the Petitioner notes that in light of the Puerto Rico Constitution, the Commonwealth now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in ——the executive branch; sets its own educational

---

states that the Virgin Islands, Guam, and American Samoa "shall have concurrent civil and criminal jurisdiction with the United States with regard to property owned, reserved, or controlled by the United States in the Virgin Islands, Guam, and American Samoa respectively." § 1704(a) (emphasis added). Section 1704 is limited to dual prosecutions related to United States property. *See, e.g.*, *Water Isle Hotel & Beach Club, Ltd. v. Kon Tiki St. Thomas, Inc.*, 795 F.2d 325, 328 (3d Cir. 1986) ("The legislative grant to the Virgin Islands was broadened further in 1982 when the United States conveyed certain submerged and filled lands to the Virgin Islands government. 48 U.S.C. §§ 1701-1708."). Moreover, other statutes contain similar language as § 1704 with respect to the fifty states, indicating that Congress, in promulgating such laws, was not intending to establish a policy on double jeopardy. *See, e.g.*, 18 U.S.C. § 2117 ("A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution. "); 18 U.S.C. § 660 (same); 15 U.S.C. § 80a-36 (same); 49 U.S.C. § 80501(b).

> policies; determines its own budget; and amends its own civil and criminal code.

(Pet.Br.37), quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974); *see also Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976) (same). The Petitioner continues: "Since 1952, the Federal Government has told the people of Puerto Rico and the world that the people of Puerto Rico democratically adopted and approved their own Constitution. That Constitution, which Congress reviewed and approved, establishes a government of the people, by the people, and for the people of Puerto Rico." (Pet.Br.37-38) (citation omitted). Puerto Rico's Constitution, therefore, in the eyes of the Petitioner, distinguishes it from the other territories and is key in making it a uniquely separate sovereign.

Like Puerto Rico, however, the Virgin Islands has achieved all of these milestones, and has done so with the express approval of the Virgin Islands people–even without a constitution. Just last Term, this Court recognized direct lawmaking, in the form of initiative and referendum, as a means for the people to exercise popular sovereignty. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, __U.S.__, 135 S.Ct. 2652, 2659-60, 2671 (2015). These forms of direct democracy have a long history in the Virgin Islands. While Puerto Rico opted to delegate drafting of a formal constitution to an elected constitutional convention, the people of the Virgin Islands have instead used the initiative and referendum procedure to alter the relationship between the Virgin Islands and the United States.

On August 17, 1916, the Virgin Islands—then known as the Danish West Indies—held a referendum on the sale of the islands to the United States, which passed with a vote of 4,727 in favor and only seven against. N.Y. TIMES, Aug. 18, 1916, p. 1, col. 5. For approximately 20 years after the transfer from Denmark to the United States, the Virgin Islands operated under a temporary government consisting of two popularly-elected local legislatures—one for St. Croix, the other for St. Thomas and St. John—and a Governor appointed by the President of the United States.

When Congress considered establishing a permanent government for the Virgin Islands, U.S. Senator Millard E. Tydings, the Chair of the Senate Committee on Territories and Insular Possessions, rejected a draft organic act prepared by the Presidentially-appointed governor, and instead demanded that another bill be drafted "which would meet with approval of the local people." U.S. House of Representatives, Committee on Insular Affairs, Hearings on H.R. 11751 to Provide a Civil Government for the Virgin Islands of the United States, 74th Cong., 2d sess. (1936), p.1. In response, the two democratically-elected Virgin Islands legislatures drafted a bill, which, with some minor changes, eventually became the Virgin Islands Organic Act of 1936. William W. Boyer, *America's Virgin Islands: A History of Human Rights and Wrongs 185-86* (2d ed. 2010).

In 1953, the Virgin Islands held a referendum on several questions, including whether to combine the two legislatures into a single legislature and to elect a

governor and a resident commissioner to Congress, which provided an impetus for Congress to replace the Organic Act of 1936 with the Revised Organic Act of 1954. BOYER 234. Although only the combined legislature was included in the original version of the Revised Organic Act, Congress subsequently amended the Revised Organic Act to provide for a democratically-elected Governor and Lieutenant Governor, *see* Pub. L. 90-496, 73 Stat. 569 (1968), and Delegate to Congress, *see* Pub. L. 92-270, 86 Stat. 118 (1972). Those amendments also abolished the Presidential veto of territorial legislation. *See* Pub. L. 90-496, 82 Stat. 837 (1968). Congress also included provisions in the Revised Organic Act allowing the Virgin Islands Legislature the discretion—which it subsequently exercised—to expand the jurisdiction of the local court system, including establishing the insular appellate court that would become the Supreme Court of the Virgin Islands. Pub. L. 98-454, 98 Stat. 1732 (1984).

Like Puerto Rico at the time of the *Flores de Otero* decision, the Virgin Islands exercises "the degree of autonomy and independence normally associated with States of the Union." The Virgin Islands elects its own Governor, Lieutenant Governor, Delegate to Congress, and members of the Legislature. The Governor appoints all lesser executive branch officials. Justices of the Virgin Islands Supreme Court and judges of the Virgin Islands Superior Court are nominated by the Governor with the advice and consent of the Legislature. The Virgin Islands sets its own budget, and amends its own civil and criminal codes pursuant to the same democratic process employed in the 50 States. While these reforms did not

occur through a constitutional convention, the history of the Virgin Islands makes it clear that these reforms were initiated either directly through the people or their democratically-elected representatives. And although Congress had to ultimately acquiesce, the same is true of the Puerto Rico Constitution, which required congressional approval before becoming operative. Thus, the Petitioner's acknowledgement of federal legislative oversight of the Virgin Islands is interesting, where Congress made the same delegations and has the same oversight in Puerto Rico, but through a constitution rather than a body of statutes.[10]

The significance of these similarities is twofold: first, as noted briefly above, the characteristics upon which the Petitioner relies to set Puerto Rico apart from the other territories in support of separate sovereignty do not accomplish that purpose; if anything, they accomplish the opposite. Second, they reflect that this Court's decision in the present matter will have critical import not only to Puerto Rico but also to the other United States territories–including, at the very

---

[10] The Petitioner maintains that Congress may not unilaterally repeal or alter the Puerto Rico Constitution or its "compact" with Puerto Rico. However, as the Petitioner acknowledges, "[i]n 1976, the Northern Mariana Islands and the United States," like Puerto Rico, "entered into a Covenant to establish a Commonwealth and the people of the Northern Mariana Islands thereafter adopted their own Constitution." (Pet.Br.38 n.4). What the Petitioner fails to note is that Congress has unilaterally amended its Covenant with the Northern Mariana Islands, most recently when it passed Public Law 110-229, 122 *Stat.* 754 (2008), which eliminated that territory's ability to administer its own immigration system.

least, the Virgin Islands. If this Court decides that Puerto Rico is a separate sovereign for the purposes of the Double Jeopardy Clause, that decision arguably could be extended to the Virgin Islands and its citizens.

The VIBA's concerns with the extension of this decision to the Virgin Islands mirror its issue with the position that the Petitioner has taken in this appeal: it saddles the territories with the burdens that go along with being a state but awards them none of the benefits. This is where Puerto Rico and the Virgin Islands share additional similarities, though somewhat less glamorous. Neither territory has representation in the United States Senate and each has only one non-voting delegate in the House of Representatives. Neither territory is entitled to electoral votes for President.[11] *See* U.S. CONST. ART. II, § 1, cl. 2 (providing for appointment of electors by "Each State"). Some federal Courts of Appeal have held that birth in a United States territory does not constitute birth "in the United States" under the Citizenship Clause of the United States Constitution and thus does not constitutionally give rise to United

---

11 This is in contrast to Indian tribes, whose members have the right to vote in presidential, congressional, state and local, and tribal elections. *See* 8 U.S.C. § 1401 (granting American Indians citizenship) *and* U.S. CONST. AMEND. XV (providing that citizens of United States shall have right to vote). The Petitioner's analogy of Puerto Rico to Indian tribes falls short, as American Indians have many of the rights that Puerto Rico and Virgin Islands citizens do not, including the very basic right to vote for President.

States citizenship.[12] *See, e.g.*, *Nolos v. Holder*, 611 F.3d 279, 283-84 (5th Cir. 2010) "([i]t is incorrect to extend citizenship to persons living in United States territories simply because the territories are 'subject to the jurisdiction' or 'within the dominion' of the United States, because those persons are not born 'in the United States' within the meaning of the Fourteenth Amendment"); *Lacap v. INS*, 138 F.3d 518, 518-19 (3d Cir. 1998) (same); *Valmonte v. INS*, 136 F.3d 914, 915-21 (2d Cir. 1998) (same); *Rabang v. INS*, 35 F.3d 1449, 1450-54 (9th Cir. 1994) (same); *see also Tuaua*, 788 F.3d at 307-08 & n.7 ("This Court, like the lower court, is [also] mindful of the years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional right."). This Court has even observed, without deciding, that individuals born in the Philippines at the time that the Philippines were a territory of the United States were not United States citizens. *See Rabang v. Boyd*, 353 U.S. 427, 430-31 (1957) ("The inhabitants of the Islands acquired by the United States during the late war with Spain, not being citizens of the United States, do not possess right of

---

[12] Of course, Congress can extend, and has extended, the statutory right to citizenship by birth to various United States territories. *See* 8 U.S.C. § 1402 (Puerto Rico); 8 U.S.C. § 1406 (the Virgin Islands); 8 U.S.C. § 1407 (Guam). What one Congress has given, however, can be taken away by a subsequent Congress. *See Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress does not impose itself upon those to follow in succeeding years."); *see also Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316 (3d Cir. 2001) ("What Congress gives it may also take away.").

free entry into the United States." (citation and quotation marks omitted)).

Finally, the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," does not apply to either Puerto Rico or the Virgin Islands. *Franklin California Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 344-45 (1st Cir. 2015), *cert. granted*, No. 15-233 (U.S. Dec. 4, 2015) ("[t]he limits of the Tenth Amendment do not apply to Puerto Rico, which is 'constitutionally a territory,' because Puerto Rico's powers are not '[those] reserved to the States' but those specifically granted to it by Congress under its constitution") (emphasis in original; citation omitted); 48 U.S.C. § 1561 ("The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States the first to ninth amendments inclusive. ").

The VIBA also takes issue with the Petitioner's position because it strips the territories of one of the benefits of their current status as a territory: single sovereignty with the federal government for the purposes of double jeopardy. When the Petitioner advocates for awarding its citizens with the protections of the Double Jeopardy Clause, it ignores that double jeopardy protections already apply. What dual sovereignty in accordance with the Petitioner's claim will actually accomplish is the creation of a second

avenue for the prosecution of the territory's citizens for an offense where only one such avenue previously existed. *See, e.g.*, *Commonwealth v. Mills*, 286 A.2d 638, 641 (Pa. 1971) ("We are talking about the two governments protecting their interests, when we really should be talking about the individual, since by focusing on the individual we see that it matters little where he is confined–in a federal or state prison–the fact is that his liberty is taken away twice for the same offense."). Thus, while Puerto Rico and Virgin Island citizens cannot vote for President, have a voting voice in Congress, or have a constitutional right to citizenship by birth, they will now be subject to being put to trial twice for an offense stemming from the same conduct, once by the federal government and once by the territorial government.[13]

In sum, this Court's decision on the question presented will have a long-standing effect that goes beyond the borders of Puerto Rico and the will of the Puerto Rico people. Because Puerto Rico, like the Virgin Islands, is still a territory, it is a single sovereign with the federal government. The judgment of the Puerto

---

[13] Notably, the Petitioner ignores that there are methods—well short of treating it as a single sovereign—for it to vindicate its authority to prosecute violations of Puerto Rico law even when the United States has initiated a similar prosecution. For example, the Virgin Islands recognizes the concept of supplemental criminal jurisdiction when a territorial offense relates to a federal crime, in which the United States Attorney for the District of the Virgin Islands and the Virgin Islands Attorney General jointly prosecute the territorial and federal charges in the District Court of the Virgin Islands as part of a single proceeding. *United States v. Gillette*, 738 F.3d 63, 70-73 (3d Cir. 2013).

Rico Supreme Court saying as much should be affirmed.

CONCLUSION

Amicus curiae Virgin Islands Bar Association respectfully urges that the judgment of the Supreme Court of Puerto Rico be affirmed.

Respectfully submitted,

DANA M. HRELIC
COUNSEL OF RECORD
WESLEY W. HORTON
BRENDON P LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 GILLETT STREET
HARTFORD, CT 06105
(860) 522-8338
DHRELIC@HORTONSHIELDSKNOX.COM

J. RUSSELL B. PATE
PRESIDENT
VIRGIN ISLANDS BAR
ASSOCIATION
2155 KING CROSS STREET, SUITE 2
CHRISTIANSTED, USVI 00820
(340) 778-7497

EDWARD L. BARRY
JOSEPH A. DIRUZZO, III
CO-CHAIRS
VIBA LITIGATION COMMITTEE

COUNSEL FOR AMICUS CURIAE

DECEMBER 22, 2015